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BY C. J. HERRITT  
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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

	)	No. 77706-3
	)	
	)	
STATE OF WASHINGTON,	)	REPLY TO RESPONSE
Respondent,	)	TO MOTION TO STRIKE
	)	NEW ISSUE ARGUED
v.	)	IN RESPONDENT'S
	)	SUPPLEMENTAL
JOHN COLEMAN,	)	BRIEF
Petitioner.	)	
	)	

I. ARGUMENT IN RESPONSE

Mr. Coleman has asked this Court to strike the Respondent's argument in its Supplemental Brief (filed August 2, 2006) that, on remand, based on State v. Davis, \_\_\_ Wn. App. \_\_\_, (Nos 23834-2-III, and 24313-3-III), and under authority of CrR 6.16(b), the State in Mr. Coleman's case may be permitted to submit special verdict

forms to the jury concerning aggravating circumstances for purposes of an exceptional sentence.

In its response to Mr. Coleman's motion to strike this new argument, the State has conceded that its Answer to Petition for Review did not address the new argument later raised in its Supplemental Brief, i.e., that State v. Davis and CrR 6.16(b) allow submission of special verdict forms to the jury concerning aggravating circumstances. See State's Response, at p. 4 ("The State's brief argument on the issue was devoted to a discussion of whether the recent amendments to the SRA could be applied retroactively").

The State contends, however, that this new argument can be subsumed within the broad "issue" statement it posed in its original Answer to Petition for Review, that this Court should therefore not strike the entirely new argument from its Supplemental Brief.

That argument should be rejected. The Respondent fails to understand that whether it chooses to use the term "issue" or "argument" to describe the entirely new legal argument it raises in its Supplemental Brief, the State failed to raise this new issue in its Answer to Petition for Review, and as a consequence, Mr. Coleman has not had any opportunity to provide any written briefing to this

Court on the complex legal issues the argument involves. The State's new argument involves issues and argument that are completely distinct and different from the statutory interpretation issues involved in the State's original argument regarding retroactivity of the Blakely "fix" amendments to the SRA. These new arguments were not raised in the State's Answer to Mr. Coleman's petition. They involve significant legal issues entirely different from the issues previously raised in the Petition and Answer.

In effect, the State is now asking this Court to decide a completely new contention it now raises in Mr. Coleman's case based only on the briefing of the State, without written briefing from Mr. Coleman. Mr. Coleman urges this Court to reject that request. The State's new argument should be stricken from its Supplemental Brief.

Alternatively, if this Court determines that the new argument will not be stricken from the State's Supplemental Brief, Mr. Coleman asks that this Court allow Mr. Coleman to provide written briefing on this issue, pursuant to RAP 12.1(b). That rule provides that the court may notify the parties regarding an issue not set forth in the briefs provided, and give them an opportunity to present written argument. This rule should apply here, to the Petitioner Mr.

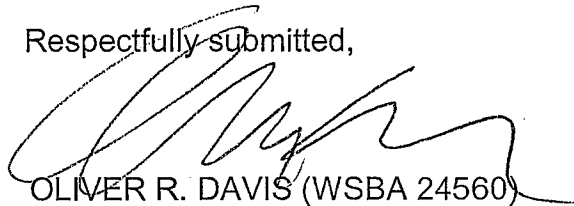
Coleman. Mr. Coleman has never been allowed an opportunity to address this new issue in written briefing, because the State did not raise the new argument in its Answer to Petition for Review, and Supplemental Briefs following acceptance of review are filed simultaneously pursuant to RAP 13.7(d).

## II. CONCLUSION

Mr. Coleman, through undersigned counsel, therefore respectfully requests this Court grant his motion to strike as described herein and in the original Motion, or to allow the Petitioner to provide written briefing on the new issue raised by the State.

DATED this 12 day of October, 2006.

Respectfully submitted,



OLIVER R. DAVIS (WSBA 24560)  
Washington Appellate Project-91052  
Attorneys for Petitioner

~~Today I deposited in the mail of the United States of America a properly stamped and addressed envelope directed to the attorneys of record of plaintiff/defendant containing a copy of the document to which this declaration is attached.~~

~~I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.~~

~~me~~  
Name \_\_\_\_\_

OCT 12 2006  
Date \_\_\_\_\_

~~Done in Seattle, Washington~~

Motion To Strike